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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Limitations on Commercial Time on Television Broadcast Stations	)	**MM Docket No. 93-254**
	)	

TO: The Commission

COMMENTS OF THE NEW JERSEY BROADCASTERS ASSOCIATION

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December 20, 1993

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SUMMARY

The New Jersey Broadcasters Association believes that marketplace forces are sufficient to regulate the amount of commercial matter on television.

This proceeding is the fifth time in the past 30 years that the Commission has considered imposing commercial limits. In each instance the Commission declined to interfere in the marketplace. In 1984, the Commission eliminated its former 16-minute "guideline." The New Jersey Broadcasters Association believes the basis for the Commission's restraint is as valid today as it ever was. Major changes in the video marketplace in the past ten years argue even more strongly for continued reliance on marketplace regulation.

Program-length commercials, or "infomercials," serve an important purpose. The Commission has previously determined that "home shopping" stations operate in the public interest and are entitled to must-carry status. On that basis, it cannot prohibit licensees from airing program-length commercials.

Finally, any attempt to regulate commercial speech would be fraught with constitutional problems. Commercial speech is protected under the First Amendment. Any regulation must advance a compelling state interest. The New Jersey Broadcasters Association believes that a restriction on the broadcast of truthful information concerning legal goods and services would

not advance such an interest and would not survive constitutional scrutiny.

The New Jersey Broadcasters Association urges the Commission to refrain from any attempts to regulate commercial speech and submits that continued reliance on marketplace regulation is in the public interest.

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The New Jersey Broadcasters Association, by its attorneys hereby submits its comments in response to the above-captioned Notice of Inquiry ("NOI"), FCC 93-459, released October 7, 1993.[1/]

I. INTRODUCTION

1. The Commission seeks comments on whether the public interest would be served by establishing limits on the amount of commercial matter broadcast by television stations. NOI at ¶ 1. The New Jersey Broadcasters Association submits that there is no demonstrated public interest benefit that would be obtained from the establishment of commercial limits on television stations, other than those already mandated by the Children's Television Act of 1990 and implemented in Section 73.670 of the Commission's Rules.

[1/] By Order, DA No. 93-1425, the Chief, Mass Media Bureau, extended the date for comments to December 20, 1993 and the deadline for reply comments to January 5, 1994.

2. The present NOI marks the fifth time in the past 30 years that the Commission has considered the question of whether it should regulate the amount of commercialization on television. See e.g. Notice of Proposed Rule Making, 28 Fed. Reg. 5158 (May 23, 1963); Commercial Advertising Standards, 36 FCC 45 (1964); TV Overcommercialization, 49 RR2d 391 (1981); Report and Order in MM Docket No. 83-670 ("Television Deregulation") 98 FCC 2d 1076, recon. denied, 104 FCC 2d 357 (1986), aff'd in part and remanded in part sub nom. Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987). In each instance, the Commission declined to interfere in the marketplace.[2/] The basis for the Commission's restraint is as valid and sound today as it was on each of the past four occasions.

II. MAJOR RECENT CHANGES IN THE VIDEO MARKETPLACE JUSTIFY NO COMMERCIAL LIMITS

3. Major changes have occurred in the video marketplace since the Commission last visited the issue of commercial limits. In 1991, the Commission's Office of Plans and Policy issued a report painting a bleak future for the television industry. That report stated:

> In the next ten years, broadcasters will face intensified competition as alternative media,

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[2/] In 1973 the Commission adopted a 16-minute "guideline" for licensees. Amendments to Delegations of Authority, 43 FCC 2d (1973). The 1984 Television Deregulation Report and Order repealed the guideline because the Commission found that "the levels of commercialization have remained significantly below the 16 minute ceiling imposed by the guideline." 98 FCC 2d at 1102.

> financed not only by advertising but also by subscription revenues, and offering multiple channels of programming, expand their reach and their audience. Television broadcasting will be a smaller and far less profitable business in the year 2000 than it is now. Although broadcasting will remain an important component of the video mix, small market stations, weak independents in larger markets, and UHF independents in general will find it particularly difficult to compete, and some will likely go dark. The analysis supports the conclusion that in the new reality of increased competition regulations imposed in a far less competitive environment to curb perceived market power or concentration of control over programming are no longer justified and may impede the provision of broadcast services.

F. Setzer, J. Levy, Broadcast Television in a Multichannel Marketplace, OPP Working Paper No. 26, 6 FCC Rcd 3996, 3999 (1991) ("OPP Report").

4. In the two years since the issuance of the OPP Report, there have been further changes. Cable companies now have plans for 500-channel cable systems. The launch of satellites capable of bringing television programming direct to viewers from space is imminent. The convergence of telephone companies, cable operators and the computer industry continues. A fourth national television network has matured to the point where it reaches most of the country and there are plans for at least two more networks.

5. Free over-the-air television can only survive in a marketplace where it is treated in the same manner as its competitors who are either unregulated or much more lightly regulated. Free over-the-air television will not survive in a marketplace in which it is prohibited from engaging in the same

selling practices from which its competitors are able to profit. The NOI speaks only of placing limits on over-the-air television. It makes no mention of placing limits on competing media. This inequity has no place in the present video marketplace. Free over the air television should be allowed to continue to compete on a level playing field with regard to its commercial practices.

III. PROGRAM-LENGTH COMMERCIALS SERVE AN IMPORTANT PURPOSE

6. The 1984 television deregulation order eliminated the previous ban on program-length commercials.[3/] Television Deregulation, 98 FCC 2d at 1102. The NOI at ¶8 seeks comment on whether there should be a limit on commercial programming that would preclude the broadcast of program-length commercials or whether some provision should be made for the presentation of infomercials and extended sales presentations.

7. The Commission has previously determined that "home shopping" stations operate in the public interest and are, therefore, entitled to must-carry status. Report and Order in MM Docket No. 93-8, 8 FCC Rcd 5321 (1993), petition for reconsideration pending. The Commission determined that "the record clearly demonstrates that market forces have revealed a desire among a significant number of television viewers for home shopping programming." Id. at 5326-27. The Commission further noted that

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[3/] The Commission prohibits program-length commercials in children's television programming. In the Matter of Policies and Rules Concerning Children's Television Programming, 6 FCC Rcd 2111 (1991).

the record had shown that home shopping stations provide an important service to a significant number of viewers who either do not want to or cannot shop in a more traditional manner. Id. at 5327.

8. If the Commission determines that stations with a home shopping format are operating in the public interest, then it cannot find that a station that airs infomercials is not operating in the public interest.[4/] The Commission's Report and Order noted the comments of the National Infomercial Marketing Association that program-length commercials are made possible only by consumer interest and they are a product of the commercial flexibility the Commission sought to encourage in its 1984 deregulation Order. Id., citing Television Deregulation, supra, at 1105.

9. Infomercials are, by definition, a hybrid of a commercial and an informational program. Commercials are intended to provide information to consumers to allow them to make informed purchasing decisions. To be sure, the traditional short-form commercial is designed to persuade the viewer to purchase a particular good or service. But, as discussed in Section IV, infra, the courts have recognized the value and importance of commercial speech and have accorded it First Amendment protection.

[4/] The constitutional problems inherent in any attempt to regulate commercial speech are discussed in Section IV, infra.

10. The infomercial is as much informational as it is commercial. The New Jersey Broadcasters Association submits that there are some goods and services that cannot be adequately described within the context of a 30-second or one-minute commercial spot. The long-form commercial provides an important service to viewers. For example, a real estate broker presenting a long-form program allows viewers to be exposed to a large number of available properties from the comfort of their own homes. A half-hour program offering discount travel provides similar opportunities to viewers. Similarly, other special interest programs on golf, cooking, investments, for instance, provide important information to viewers about particular goods or services.

11. The presentation of information in a long-form commercial about goods and services paid for by the entity offering the goods or services does not detract from its public interest benefit, as long as the viewer is informed that the information is paid commercial programming. Our daily lives revolve around information on goods and services paid for by the entity offering the goods and services. Newspapers and magazines publish multi-page advertisements, direct mailers send flyers and brochures, and telephone solicitors engage in lengthy conversations. Television stations should not be the only medium in which a lengthy presentation of information about goods and services is prohibited.

12. A restriction on the presentation of a long-form commercial makes no sense in today's multi-media world. Perhaps thirty years ago, when significant numbers of persons could only receive one or two television station, a restriction on long form commercials was arguably necessary since a viewer was not able to exercise a choice by changing the channels if the presentation of a long-form commercial took place. Today, however, when most people receive multiple channels over the air and many more by cable, a restriction on long-form commercials for television does not make any sense.

IV. ANY ATTEMPT TO REGULATE COMMERCIAL SPEECH WILL BE FRAUGHT WITH CONSTITUTIONAL PROBLEMS THAT MAY PROVE INSURMOUNTABLE

13. The Commission faces a difficult task in attempting to regulate commercial speech. The Commission's 1984 Report and Order touched briefly on the constitutional problems inherent in any attempt to regulate protected commercial speech. Television Deregulation at pp. 1103-04. The Commission stated that it was concerned with the "potential chilling effect on commercial speech" which its guideline might effect and observed that the Supreme Court had granted significant protection to commercial speech. Id.

14. The Supreme Court extended First Amendment protection to commercial speech in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 447. 455-56 (1976). The government may "regulate the content of constitutionally protected speech in order to promote a compelling

interest if it chooses the least restrictive means to further the articulated interest." Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989) (upholding FCC restriction on "dial-a-porn" services). Commercial speech, the Court has held, enjoys a lesser level of protection than other forms of constitutionally guaranteed expression. Board of Trustees of State University of New York v. Fox, 492 U.S. 469 (1989).

15. In Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566 (1980) the Court articulated a four-factor test for commercial speech:

> At the outset we must determine whether the expression is protected by the First Amendment. (1) For commercial speech to come that within that provision, it must at least concern lawful activity and not be misleading. Next, we will ask (2) whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine (3) whether the regulation directly advances the governmental interest asserted, and (4) whether it is not more extensive than is necessary to serve that interest.

16. During its most recent term, the Court had occasion to consider the question of protected commercial speech in two contexts with different results. Both applied the Central Hudson test, which would be applicable to any attempt by the Commission to regulate the quantum of commercial speech on television.

17. In U.S. v. Edge Broadcasting, __ U.S. __, 113 S.Ct. 2696 (1993), the Court upheld the Commission's ruling that a broadcast station licensed to a community in North Carolina, which does not have a legal state lottery, could not broadcast

advertisements for the legal state lottery in the neighboring station of Virginia. The station is on the Virginia-North Carolina border. The Court readily agreed that the first two factors of the Central Hudson test were met: the advertising concerned lawful activity and was not misleading and the asserted governmental interest in supporting the policy of lottery states and not interfering with the policy of non-lottery states was substantial. Id. at 2699. The Court also found that the third factor was met in that the prohibition against lottery advertising by stations in non-lottery states advanced the governmental purpose of supporting those states' gambling laws. Id. Finally, the Court found that the fourth factor was met as well because "the fit between the restriction and the government interest" was "reasonable." Id.

18. The second recent commercial speech case was Edenfield v. Fane, ___ U.S. ___, 113 S.Ct. 1792 (1993), which invalidated a Florida statute prohibiting CPAs from directly soliciting clients. Applying the Central Hudson test, the Court found that the state's interest in protecting consumers from fraudulent advertising and preserving the independence of CPAs in auditing businesses and preparing financial statements was not advanced by its ban on solicitation. Id. at 1798. Thus, the ban could not withstand scrutiny.

19. Any regulation of constitutionally protected speech must utilize the least restrictive means suitable to achieving the government's articulated, legitimate goals. United States v.

O'Brien, 391 U.S. 367, 377 (1978). Even where the government has articulated a substantial interest in regulating speech, fashioning the least restrictive means of regulating such speech is not an easy task. Since 1988, courts have agreed with the Commission that there is a substantial governmental interest in protecting children from indecent speech during certain hours of the broadcast day. See Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988) ("ACT I"). But the Commission has, so far, been unable to craft a rule that would serve that interest in the most narrowly restrictive manner. See ACT I, supra; Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) ("ACT II"); and Action for Children's Television v. FCC ("Act III"), No. 93-1092, decided November 23, 1993, 1993 U.S. App. LEXIS 30125.

IV. CONCLUSION

20. Commercial speech, as the Supreme Court recently noted, serves an important role in our society (Edenfield v. Fane, 113 S.Ct at 1798):

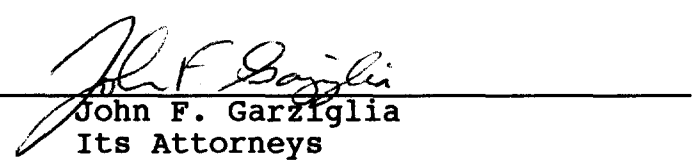
> The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to coverage of the First Amendment (emphasis supplied).

21. The NOI presents no evidence that would support a limit on commercialization for broadcast television stations to the exclusion of all other media. There is no evidence "home shopping" formats are detrimental to the public interest or that the outright prohibition of such programming would serve a compelling government interest. A blanket limit on commercialization in programming other than that directed to children age twelve and under would serve no governmental interest. It would, as the Commission and the Court have observed, inhibit competition, impose enormous paperwork burdens and ensnare both truthful and misleading commercial speech in its net.

For the forgoing reasons, the New Jersey Broadcasters Association respectfully recommends that the Commission take no further action in this proceeding and that it refrain once again from imposing any further commercialization limits on television programming.

Respectfully Submitted,

THE NEW JERSEY BROADCASTERS ASSOCIATION

By 
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December 20, 1993